

State is referred to in a Petition given in for
M'Farlane.

The Lord Clerk
will be pleased
to preserve this
State as the
Copies are all
exhausted

STATE OF THE PROCESS,

GEORGE M'FARLANE of Faslane;

AGAINST

ALEXANDER M'NAB, in Achalader.

THE pursuer insists in an action against the defender for payment of the sum of 39 *l.* sterling, as the price of thirteen stots, which the pursuer delivered to him to be wintered, about twenty years ago, which he never returned, with interest and expences of process.

It was *inter alia* pled for the defender, that the pursuer and he having, several years ago, bargained together, that he, the defender, for a certain price, was to winter on his grounds thirty head of black cattle; the pursuer, in place of sending thirty, sent forty, whereby the grounds were over-stocked, and the whole cattle were thereby hungered, in so much, that ten of the pursuer's cattle died; as for the other three, the defender knew nothing of them. And that being the fact, he contended, that, since these cattle perished thro' the

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Act. p. 19.
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purfuer's own fault, in over-ftocking the grounds, he was not liable therefor. But, *fecundo*, He is not, by law, liable for any accidents befalling the cattle sent him to be wintered. He kept a herd to take care of them, who did his duty, which was all incumbent upon the defender.

Whereunto it was answered for the purfuer, That as the defender has acknowledged the receipt of the cattle, he must be liable for the price thereof, unlefs he prove that he objected againft receiving them, and intimated to the purfuer, that he had over-ftocked the ground, and that therefore the defender was not to be liable in the confequences. And as to the fecond defence, that the defender is not by law accountable for accidents befalling cattle committed to his charge, becaufe he kept a herd to take care of them, who did his duty, the purfuer is confident that no fuch thing will appear in the prefent cafe; on the contrary, that it will appear upon a proof, that from the neglect of the defender, and his herd, fome of the purfuer's cattle were allowed to breck their necks over rocks, without the bounds of the defender's grounds, and that of thofe that the defender delivered back to the purfuer, two or three of them belonged to another man, who evicted them from him, which accounts for that number which the defender pretends he knows nothing of. And further, that as to the letter produced, it fufficiently inftructs, that the defender looked upon himfelf as bound to be accountable for the whole cattle; for, in it, he fubmits the matter.

Vid. p. 21.

Upon advifing of which debate, the Lord Woodhall, Ordinary, fufained the defences proponed for the defender, affolized him from the procefs, and decerned.

Againft which interlocutor the purfuer gave in a representation to the faid Lord Ordinary, fetting furth, that the fact charged in the libel is this, that the purfuer bargained with the defender for wintering a parcel of ftots on his grounds, which were delivered accordingly; but inftead of receiving

receiving them back, as he ought to have done, ten were never delivered at all, and of these which were delivered, three were evicted from the pursuer, as the property of another person; the consequence of this, the pursuer apprehends to be, that he is intitled to the price of his cattle, unless very good cause is shown why the defender should not be liable. The case pointed at is, that more were sent than were agreed to be received, but of this the defender gives no evidence; nor has he so much as pretended to say, he objected to the number sent; the presumption is certainly, that the person receiving had no objection to the number, since he took them without challenge: It was incumbent upon him, or his servants, not to suffer the ground to be over-stocked. He has offered no evidence to instruct that the bargain was only for thirty, and his accepting of forty into his custody, excludes that pretence, and subjects him to account for the number received. As to the other defence, that he is not answerable for fatalities, such as their perishing in bogs, or over rocks, or precipices, especially as the grounds, on which they were to be wintered, were not inclosed, the pursuer must humbly submit, whether this can afford a sufficient defence. There is certainly something incumbent upon those who undertake the wintering of cattle for hire; care and custody is due to a certain degree, as well as an extent of ground; and therefore it is incumbent upon the defender to show, that this case has been adhibited, or at least that he has given fair warning to the pursuer, that he would run no risk, and that he objected to the number sent upon the ground; neither of which he has attempted to do: On the contrary, it appears to be instructed by the defender's own letter, in process, there, without making any objection to the number, or pretending not to be liable for common care, he fairly admits, that whatever can be proved to have been lost, shall be made good, upon paying the grafs-mail. He points out a method for that purpose, by bringing the matter
before

before a Justice of Peace; but this not being done, the same enquiry is still open, and the like proof still capable of being brought: And the pursuer humbly insisted on these special qualifications to support his libel, *viz.* First, That the cattle were received without any objection to their number. Secondly, That he offered to prove many of them were suffered to straggle, or wander away from the defender's grounds, by the want of a herd to turn them back, or by the negligence or non-attendance of the person named to that charge, whereby they perished, or were lost in bogs, and amongst precipices, without the defender's bounds. Thirdly, That three of these which were actually returned, were found to be the property of other persons, and as such evicted, which therefore remain to be made good to the pursuer: And of these particulars, the pursuer is willing to undertake a proof, which he humbly hoped his Lordship would give him an opportunity of doing. Therefore, craving that it might please his Lordship to re-consider the former interlocutor, and to repel the defence founded on the alledged number of the cattle, as also, the separate defence, that he was liable to take no care of the cattle; and allow the said representer to prove the several circumstances before-mentioned, particularly the receiving of the cattle, by the defender's servant, without objection; that severals were lost for want of due care, by being suffered to wander from the defender's grounds, without any person to look after them, or bring them back again. And, lastly, To find the pursuer intitled to the value of the cattle so lost, and of those delivered, which were evicted by other people; he, the pursuer being always accountable to the extent of the grass-mail, in terms of the defender's own letter produced, and to grant diligence for bringing this proof before his Lordship, or in such other manner as his Lordship should be pleased to appoint.

To which representation there was answers given in for the defender, as follows; *viz.* Sometime about the year

1740,

1740, the pursuer desired the defender to winter 30 head of cattle for him, to which he agreed, and the grass mail was fixed, probably at the common rate of the country, eighteen pence or two shillings *per* head, perhaps at less than that. It was likewise agreed, that the defender was not to be liable for any hazards. This the pursuer is pleased to controvert; yet it was submitted, if from the state of the case it is not evident, that such must have been the meaning of parties. Can it be supposed that any man would have been so foolish as to insure cattle for one winter in those grounds, at eighteen pence or two shillings *per* head, and to grass them? besides, the sum is too small for insurance alone: But, to strengthen this interpretation of the bargain, if it were necessary, which the respondent humbly pleaded it was not, the oath of the respondent in the former process betwixt the same parties, where this claim was proponed by the present pursuer, in compensation of a greater claim pursued on by the respondent; this oath, it was humbly apprehended, must still be admitted as sufficient evidence of the bargain, so far as it goes, and of the facts contained in it, to which the respondent begged leave to refer, page 14th of the Decreet. There are several decisions directly in point to establish this doctrine, observed in the Dictionary, vol. II. *verb. res inter alios*, page 349, where a difference is very well taken notice of, betwixt an oath taken, *officio judicis*, and one taken *parte deferente*, which is the case here: The first is not admitted as evidence in a different process, on the same ground of debt. The last is, the 30th of November 1709, Souhan *contra* Boswell, and the 2d of February, 1722; Ferguson against Maitland, where a negative oath, emitted in a forthcoming, was found to meet an arrester pursuing for payment of the same debt, upon the new medium of an assignation; that case is much stronger than the present: Besides, the pursuer has never offered to deny, that 40 were sent, when the grazing of 30 was only bargained for: These facts are proved by the

oath. It is here observed by the representer, that the defender did not object to the receiving so many more than were agreed upon ; therefore it is to be presumed, that he had no objection to the receiving of them. The answer is obvious, from the following considerations: That drovers have their grazings a great distance from their homes, so that they are always trusted to their herds: That they are very well acquainted with the grounds possessed by each other, and the numbers they can graze ; and they are well acquainted with one anothers herds ; and as the masters have a very small oversight of the cattle, being at such distance, they trust more to the herds than to the masters the danger of returning the cattle at that late season of the year, which must have been done, had the supernumerary ten been returned, and the chance of a favourable season, in which case they all might have escaped. One of the desires of the representation is, that his Lordship might be pleased to repel the defence, that the defender was liable to take no care of the cattle. This defence has escaped the respondent's notice ; and he believes, that in reality no such defence was offered. It is admitted indeed, that care and custody are due, but it is not admitted that neglect will be presumed ; if it is alledged, it must be proved. And, as the pursuer insists upon a proof of his allegations, the defender humbly insists, that it should be limited to what is not already proved by the oath. The said respondent begs leave to differ from the representer in stating the purport of the letter founded on ; for in the letter it is not meant nor exprest, that the respondent should subject himself in general to pay for what cattle shall be proved to have been lost, but only to pay for such as shall be proved to have been lost by the negligence of the herd. In the body of the letter, the pursuer's allegation is stated ; and the allegation in the postscript, the respondent apprehends, must apply directly to the allegation in the body of the letter. It is not to be supposed that he would oblige himself to pay more than he thought was demanded

demanded. It is not a little surprizing, that the pursuer did not accept of the amicable proposal contained in the letter, but chose to bring this trifling affair into this court, at such a distance of time, seeing it might have been much sooner, and more easily determined by the Justices of the peace in that country, to whom it was referred, as they are fully acquainted with the specialities in this case, arising from the situation and customs of the country.

Upon advising of which representation and answers, the Lord Ordinary, before answer, allowed the pursuer to prove, *prout de jure*, his libel, and several facts set forth in the said representation, and all facts and circumstances relative thereto, and allowed the defender a conjunct probation thereanent, as also allowed Alexander Macnab, the defender, to prove also *prout de jure*, his defences and facts, set forth in his answers to the said representation, and all facts and circumstances relative thereto; and allowed the pursuer a conjunct probation thereanent; and granted commission and warrant for letters of diligence for that effect.

Thereafter the parties having submitted the said process to certain arbiters, by a clause in said submission, the parties agree, that altho' the submission should blow up without a final decret arbitral, yet that all the proof that might be taken and received in the course thereof, should be held and admitted of the same force as if the same had been before the court of session, to all intents and purposes.

In the course of which submission, the following proof was adduced: *viz.*

ALEXANDER MACFARLANE, tenant in Gartnernich, depones, That he knows it to be the practice in the parish of Kallender and Aberfoyle, for the herds of cattle to see those under their care once in the twenty-four hours; and if any of
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the cattle be amissing, to give notice thereof to his employer or master, within twenty-four hours, if he lived within twelve miles distance, or thereby. Depones, That he has always heard it to be the practice in the foresaid parishes, for the grazier to intimate to the owner of the cattle their being lost or amissing, within twenty-four hours after the said loss came to the grazier's knowledge, tho' he never knew that practice to be put in execution; only the deponent himself neglected to intimate in proper time, the loss of a quey to the owner, which was a grazing and wintering with the deponent, in his own possession; and on a reference by the owner and him, the deponent paid what was determined, being a part of the value: And another owner of a quey lost upon the deponent's possession, frequently craved him for the value, and even pursued him before the Justices of the peace for it, but the owner dropt the process, upon the deponent's promising to refer the difference. Depones, That the last mentioned quey was lost about 16 years ago, and the owner, about a month ago, desired him to get the matter determined. Depones, That the now deceased Alexander Macnab was herd to Alexander M'Nab, one of the submitters, above 17 years ago, in Glaschoile; and that George M'Farlane foresaid had at that time wintered with Mr. M'Nab some cattle, which Mr. M'Farlane's servants told the deponent amounted to 40 stots; and Mr. M'Nab's herd told the deponent, that Mr. M'Farlane's stots were to get the half of Mr. M'Nab's hay he had in Glaschoile; and the deponent saw only one of them fed with hay, and knows nothing about the rest. Depones, That he has seen Mr. M'Farlane's stots, some of them several times stray near a mile off their pasture, and come back again, which he thought nothing of; and he cannot condescend on the number of times he saw them so straying; and that he saw one of them, a large black stot, with large horns, lying dead at the foot of a rock, within a gun-shot of the pasture, and Mr. M'Nab's march goes to the top of that rock; and he heard the people of Glaschoile carried the stot home, and made use of it. Depones,
That

That Alexander M'Nab, the herd, was a very bad herd; and that he has known him during the time Mr. M'Farlane's stots were wintering at Glaschoil, leave the cattle, and go to the Killin, or thereabouts, for the space of a fortnight; and leave them another fortnight, and thig corn in Montcith, as the herd told him. Depones also, That the said herd told him he was absent six or eight days during the foresaid time, buying and dealing in brandy; and that the said herd, about May-day, told the deponent, that eleven of Mr. M'Farlane's stots were wanting; and the deponent cannot say how many of them were delivered. Depones, That the deceast Finlay M'Keich, at Bridge of Turk, about four days, and within six after the foresaid stots were delivered to Mr. M'Farlane's servants, told the deponent he had taken off two of them, whereof one belonged to him, the said Finlay, and the other to Duncan Stewart in Auchray; and the deponent saw the said Finlay driving them home; and the herd, Alexander M'Nab then said, there was now thirteen of Mr. M'Farlane's stots amissing. Depones, likewise, That Donald M'Inlister shoemaker, deceast, told him he had got one whole hide, and some pieces of hides of dead cattle, belonging partly to Mr. M'Farlane, and partly to Mr. M'Nab, about the foresaid time; and John M'Nab, also deceast, in Glaschoil, told the deponent he had sold parts of these hides. Being interrogate for Mr. M'Nab, depones, That he served him as herd for the space of three years, in summer and harvest time; and that he served Mr. M'Farlane for the space of two whole years, for the most part as his herd; that he did not give himself the trouble to see the cattle, if any were amissing, each four and twenty hours, because he had other work to do, by his master's order, and had another herd with him, that herded by turns. Depones, That the lands of Glaschoile are full of woods, and a great deal of moss therein; and that cattle, tho' well and living, have been found, after four days search, tho' they could not, on a search before that time be found, which is partly owing to the woods, mosses, fogs and glens; *causa scientie*, the deponent

nent has lived in Glaschoil, and the neighbourhood, these twenty one years bygone, and so had occasion to know, as he has deponed. And this is the truth as he shall answer to God.

Walter M'Farlane, in Letter of Straithgartny, depones, That he knows not the general practice of the country, anent herding, but depones, that for the space of six or seven years he was employed, and served Patrick Graham, of Badyvow, and Robert Graham, of Seanchoil, as one of their herds in the parish of Aberfoile; that they told him he was to be answerable for what cattle should be lost, if he did not inform them of their being amissing in three or four days, or so, after he should first miss them; and he was desired to see that he had his black cattle once every day, or once in the space of two days at farthest. Depones also, That he has frequently heard it told by severals, that people who take other folks cattle a grazing for hire, were liable for the values of such of them as were lost, unless they intimated said loss to the owners within three or four days after the cattle were first amissing. Depones, That he knew Alexander M'Nab, deceased, was herd at Glaschoile to M'Nab, a good many years ago, and that said herd told the deponent he had under his care at Glaschoile, wintering, some stots pertaining to Mr. M'Farlane; that the deponent's father told him he had found a good large stot lying dead in a burn, at the foot of Murlakan craig, which the herd told his father belonged to Mr. M'Farlane, and the herd afterwards showed to the deponent the hide of that beast hanging in a barn in Glaschoile, and then told the deponent it belonged to the said Mr. M'Farlane; and the deponent saw, from certain marks on the ground, that said stot had fallen over the craig. Depones, That about the foresaid time he heard it told by the neighbours that Alexander M'Nab neglected his said master's service, as he sometimes went up and down the country about other business of his own, particularly

larly dealing in brandy near Kilmahoy, and Callender kirk. Depones, That the said herd told him that he was to give Mr. M'Farlane's cattle some hay, if they needed it. Depones, That the lands the deponent herded on, the time foresaid, marched with the grounds that the said stots were pastured on, and that he, for himself, did not observe the herd absent himself from his business of herding, tho' he might have been absent for a month together, for any thing he could know, tho' he several times saw him once a day, once in two days. Depones farther, That he heard that, at the time the stots were delivered to Mr. M'Farlane's servant, there were twelve or fourteen of the said stots amissing. *Causa scientie patet.* And this is the truth as he shall answer to God.

Duncan Stewart, in Auchray, depones, That it is the practice of the country in the parishes of Callender, Aberfoile, and part of Monteith, that when people take cattle to graze, that when any of them are lost, the grazer is obliged to inform the owner of their being lost in the space of twenty-four, or forty-eight hours, at farthest, otherways the grazer is liable for the value of the cattle that are lost. Depones, That he had, sixteen or seventeen years ago, cattle grazing on the mailling which marches with Glaschoile, which time Mr. M'Nab's herd told the deponent that he had some stots grazing for Mr. M'Farlane, and which stots the deponent then saw there, and they now and then came upon his grass, as his went also upon Mr. M'Nab's grass. Depones, that he heard some of them were lost, but cannot say how many, and the deponent's herd told him that a stot fell over Murlakan craig and died. Depones, That Mr. M'Nab's herd, oftner than once, during the time of wintering Mr. M'Farlane's stots, absented himself from his herding for two or three days together, when he went to Killin, as he told ; and the deponent saw the herd at his own house, in
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his way to and from Killin, but the deponent knows not if the herd left one to herd for him in his absence. Depones, that the stots were delivered, as he was told, some days after May-day, to Mr. M'Farlane's servants, and there was one stot that belonged to the deponent, and another to Finlay M'Keich, as M'Keich said, among the delivered stots, and M'Keich went after the stots, and brought them both back to the deponent's grass in about fourteen days thereafter, and M'Keich said that these two stots had been delivered by Mr. M'Nab's herd to Mr. M'Farlane's servants, as a part of Mr. M'Farlane's stots. *Causa scientia patet.* And this is the truth as he shall answer to God. And, further depones, upon Mr. M'Nab's interrogatory, That the lands of Murlagan were, the year foresaid, possessed by the deponent, under Mr. Graham of Badyvow, and, at the same time, Mr. Graham possessed these lands in conjunction with him. And this is also truth as he shall answer to God.

There is produced for the pursuer, for instructing his libel,

A Letter, subscribed by the defender, and addressed to the pursuer, of the following tenor, " Sir, Whereas you alledge you lost some stots in Glaschoile, by the negligence of my herd, and that you say you can prove the same : So, to take this debate out of the way, you and I are to appoint a day betwixt this and Lammas, in some convenient place, in Stirling-shire, and oblige me to bring Alexander M'Nab, who was then my herd, before a Justice of Peace. So I wish you may acquaint me of the day, and I am, Sir, your most humble servant." Which missive is dated at Achalader, the 4th of May, 1740 years ; to which is subjoined the following postscript : " Whatsoever you can prove, or make appear,

pear, I oblige myself to refund your loss, upon paying me my grass-mail. Adieu."

And there is produced for the defender, a decret at the instance of James Campbell, writer in Inverary, against the pursuer, for payment of certain sums of money ; in which decret it was alledged for George M'Farlane, the now pursuer, defender therein, that the sums pursued for was a trust for the behoof of Alexander M'Nab, the defender in this process, which, if acknowledged, he had two relevant grounds of compensation, *viz.* In the first place, That Mr. M'Nab was debtor to him in the price of thirteen head of cattle, at forty shillings *per* head, since the year 1739, when George M'Farlane sent a parcel of cattle to graze on M'Nab's lands of Glaschoile, eleven of them were lost by neglect of him and his herds, some of whom he suffered to starve, and others to fall over the rocks and break their necks, in places without M'Nab's grounds, and two of them delivered to George M'Farlane's servants, afterwards found to be the property of other people, and were claimed and returned to them as such ; for proof of which the above missive is appealed to. And, *secondly*, M'Nab was debtor to him in the price of three head of cattle, at the above rate of forty shillings *per* head ; which two articles of compensation being allowed, they would more than extinguish the balance claimed ; and, the said James Campbell having acknowledged the trust, the said Alexander M'Nab, by appointment of the Ordinary, compeared, and deponed as follows, *viz.* That as to the first article of compensation pled, he never engaged to be answerable for any hazard ; that George M'Farlane agreed to pay him a certain price for wintering thirty head of cattle, which the deponent engaged to do at 30 *l.* Scots ; but as he was informed by his servant, the defender sent forty head of cattle in place of the thirty agreed on ; and that his servant likewise informed him, that ten of them perished by overstocking,

stocking, but never heard that any of them perished by breaking their necks over rocks, or out of the deponent's ground; but never heard of any more of these cattle perishing; and as to the two cattle delivered to George M'Farlane, and alledged belonged, and claimed by, and restored to other people, the deponent knew nothing of the matter. And as to the second article of compensation, deponed, That the full number of cattle, for which he got the bill, was delivered. And this was truth, as he should answer to God.

5th June, 1758. With which proof, great *avisandum* was made, upon the 11th of March 1758, and the term circumduced against the defender; and he having thereafter applied, by petition, to be reponed against the said circumduction; and the procurator for the pursuer having judicially declared he had no objection to the granting the desire of the petition; the Lords, of this date, of new allowed the pursuer a proof of his libel, and all facts and circumstances relative thereto; and the defender a proof of his defences, and all facts and circumstances relative thereto; and allowed both parties a conjunct probation of all facts and circumstances that should be judged material for them in the cause.—And the defender having failed to extract an act and lead any proof,

The term was again circumduced against the defender for not proving and reporting. All which the Lord preparer remits to the Lords at advising.

GEO. SINCLAIR.

